BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.



| | | |
|---|---|---|
| In re | ) | |
| | ) | |
| Policies and Rules for the | ) | |
| Direct Broadcast Satellite Service | ) | IB Docket No. 98-21 |



**REPLY COMMENTS OF PRIMESTAR, INC.**

**REED SMITH SHAW & McCLAY**
1301 K Street, N.W., East Tower
Suite 1100
Washington, D.C. 20005

**WILLKIE FARR & GALLAGHER**
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Attorneys for PRIMESTAR, Inc.

April 21, 1998

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

| | | |
|---|---|---|
| In re | ) | |
| | ) | |
| Policies and Rules for the | ) | |
| Direct Broadcast Satellite Service | ) | IB Docket No. 98-21 |

**REPLY COMMENTS OF PRIMESTAR, INC.**

PRIMESTAR, Inc., by its attorneys, submit these Reply Comments in the above-referenced proceeding.[1]

## I. INTRODUCTION AND SUMMARY.

The comments in this proceeding applaud the Commission's proposed streamlining efforts and generally concur in the Commission's approach to consolidating Part 100 with Part 25. In particular, PRIMESTAR notes that most commenters urge the Commission to retain its current case-by-case review of ownership issues presented by proposed transactions rather than adopt a cable/DBS cross-ownership rule. The issue of cable/DBS cross-ownership simply will not arise very often, and by maintaining a flexible approach, the Commission will have a more informative and complete record in which to decide whether any ownership limitation would be appropriate.

Moreover, the Commission should reject efforts of certain commenters to impose ownership limitations on entities affiliated with cable operators based upon PRIMESTAR's experience in the

---

[1] In re Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, IB Docket No. 98-21, FCC 98-26 (February 26, 1998) ("Notice").

marketplace. These arguments are a naked attempt to collaterally attack the PRIMESTAR transactions presently before the Commission. These efforts are, therefore, completely misplaced and, moreover, conveniently ignore the evidence PRIMESTAR has presented which demonstrates the benefits that would flow from the approval of the transactions. The PRIMESTAR transactions demonstrate that sweeping ownership limitations can, and in this case, would wrongly impede a beneficial investment. Such ownership limitations should be avoided here.

The Commission should act as indicated below on the following issues:

- The Commission should affirm the International Bureau's interpretation of the DBS foreign ownership rules;
- The Commission should reject efforts to modify DBS geographic service obligations; and
- The Commission should decline to consider SkyBridge's proposal in this proceeding.

## II. THE COMMISSION SHOULD NOT ADOPT A CABLE/DBS CROSS-OWNERSHIP RULE IN THIS PROCEEDING.

The vast majority of the comments in this proceeding concur with PRIMESTAR that the Commission should continue to consider ownership issues on a case-by-case basis and should not adopt general ownership limitations applicable to DBS licensees.[2]

---

[2] Comments of United States Satellite Broadcasting Co., Inc. at 7; Comments of TEMPO Satellite, Inc. at 7; Comments of Ameritech at 3-5 ("Ameritech Comments"); Comments of the Office of Communication of the United Church of Christ and Consumers Union at 3 ("UCC Comments"); Comments of The News Corp. Ltd. at 3-4; Comments of Time Warner Cable at 2-7; and Comments of the National Cable Television Association at 5-7. EchoStar and NRTC

However, several of the commenters either urge the Commission to adopt a generally applicable cable/DBS cross-ownership rule based upon allegations raised in the past concerning PRIMESTAR, or argue that the PRIMESTAR transactions should not be approved in the proceedings presently before the Commission.[3] For the reasons set forth in PRIMESTAR's comments and herein, the record before the Commission with regard to the PRIMESTAR transactions demonstrates that a generally applicable cable/DBS cross-ownership prohibition would prevent beneficial transactions and that the PRIMESTAR transactions are in the public interest and should be approved. In any event, the arguments raised by commenters opposing the PRIMESTAR transactions are misplaced and should not be considered in this proceeding.

### A. The Commission Should Proceed On A Case-By-Case Basis In Determining Whether Particular Ownership Proposals Are In The Public Interest.

The majority of the commenters agree that it is clearly preferable to consider DBS ownership issues on a case-by-case basis, rather than through the adoption of a general rule.[4] As demonstrated in those comments and as further set forth below, the Commission should forego the consideration or adoption of a cable/DBS cross-ownership rule.

---

are alone in their disagreement with this position. Comments of EchoStar Communications Corp. at 3-5 ("EchoStar Comments"); Comments of the National Rural Telecommunications Cooperative at 5.

[3] These commenters rely upon the same arguments already rebutted in the PRIMESTAR proceedings. See generally PRIMESTAR filings in File Nos. 91-SAT-TC-97 and 106-SAT-AL-97.

[4] See supra note 2.

As recognized by the Office of Communication of the United Church of Christ and Consumers Union ("UCC"), the issue of cable/DBS cross-ownership simply will not come up often enough to warrant the adoption of a generally applicable cable/DBS cross-ownership rule.[5] Thus, given the fact that few cases will be presented to the Commission and the fact that the record for a particular proceeding will be far more informative and complete than would be possible in a rulemaking, the Commission should proceed on a case-by-case basis.[6]

---

[5] UCC Comments at 3. If, as PRIMESTAR suggests in its Comments, the dynamic nature of satellite technology increases the available space segment capacity for the provision of DBS/DTH services, there simply is no basis for concern as to cable/DBS cross-ownership. See PRIMESTAR Comments at 10-13.

[6] Ironically, one of the leading proponents of a cable/DBS cross-ownership rule illustrates why it is important that the Commission decline to follow such a course. While EchoStar urges the Commission to adopt a cable/DBS cross-ownership rule, it also seeks an exception to that rule in the event the PRIMESTAR transactions are granted. EchoStar Comments at 5. Similarly, Ameritech argues that it, as a cable operator, should not be prohibited from owning an interest in a DBS service because it is a "new entrant" into the cable business. Ameritech Comments at 15-16.

These requests for exceptions to a cross-ownership rule demonstrate that general ownership restrictions are usually too broad, precluding ownership interests that should not raise concern. This result is sometimes tolerated if the cost of proceeding on a case-by-case basis is too high given the number of times the issue could arise. As demonstrated above, this is not the case here. Thus, the cost of proceeding on a case-by-case basis is very low, while the loss of competition and its benefits flowing from wrongly prohibited ownership interests is very high. The Commission's long-standing commitment to a flexible regulatory structure for DBS service should be followed here by ensuring that the Commission will have an opportunity to approve transactions that serve the public interest.

### B. The Commission Cannot Proceed With Implementing Ownership Restrictions Based Upon Past Allegations Of How PRIMESTAR Will Compete; PRIMESTAR's Competitive Track Record is Firmly Established.

EchoStar and DirecTV argue that the need for a cable/DBS cross-ownership restriction is proven by the Commission's reference to PRIMESTAR in its recent decision to limit cable participation in the Local Multipoint Distribution Service ("LMDS").[7] In that proceeding the Commission decided to restrict incumbent cable operators and local exchange carriers from owning LMDS licenses in their service areas, stating that it was attempting to prevent behavior like that feared by the State Attorneys General, the allegations of which led to the PRIMESTAR Consent Decrees.

The past allegations and fears of the State Attorneys General and the Department of Justice simply cannot be relied upon to justify the adoption of a cable/DBS cross-ownership rule. The Consent Decrees were premised upon fears of future behavior by PRIMESTAR that never materialized. PRIMESTAR has demonstrated in the record of the transactions presently before the Commission that it has been as competitive as possible, given the limitations imposed upon it by its dish size. Indeed, the record shows that PRIMESTAR's efforts have been extremely successful despite this serious constraint. PRIMESTAR has briefly described some of this evidence in its comments in this proceeding.[8]

---

[7] EchoStar Comments at 4; Comments of DirecTV, Inc. at 8. See In re Rulemaking to Establish Rules and Policies for Local Multipoint Distribution Service, 12 FCC Rcd. 12545 (1997).

[8] PRIMESTAR Comments at 16-17.

PRIMESTAR's competitive efforts are now a matter of record, and the time for predictive judgments about PRIMESTAR's behavior is over.[9] To adopt a cable/DBS cross-ownership rule based upon PRIMESTAR's actions, the Commission must find, based upon PRIMESTAR's actual performance in the marketplace, that PRIMESTAR has not competed; it can no longer merely predict that PRIMESTAR's structure and/or ownership will not allow it to compete.[10]

Some commenters assert, citing PRIMESTAR's pending transactions as an example, that DBS services commonly owned with cable systems will develop DBS service as a complement to cable service, rather than as a competitor. Any such assertion should be rejected as a naked mischaracterization of the record in the PRIMESTAR proceedings. First, if this motivation were true, then PRIMESTAR's medium power service would be a complement to its owners' cable systems. Certainly, that is not the case. The fact that PRIMESTAR's service received a far higher customer satisfaction rating than its owners' cable systems in a recent J.D. Power and Associates survey is persuasive evidence that PRIMESTAR not only offers an independent service, but a superior service.[11]

---

[9] See Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992).

[10] PRIMESTAR notes that any such prediction would be contrary to the record in the PRIMESTAR transactions.

[11] J.D. Power and Associates 1997 Cable/Satellite TV Customer Satisfaction Study[sm]. Study based on 10,541 satellite/cable TV subscriber responses.

Second, PRIMESTAR has stated unequivocally that it will offer a high power DBS stand-alone retail service marketed directly to consumers. It will be packaged, positioned, and marketed to compete with all MVPDs. PRIMESTAR's high power offering will allow it to better compete with cable systems because a smaller dish will allow it to market its service more effectively in urban and suburban areas. In addition, as an ancillary service, PRIMESTAR plans to offer a wholesale DBS offering on a nondiscriminatory basis to all non-satellite MVPDs, thereby expanding options available to consumers, a result which is clearly in the public interest.

## III. THE COMMISSION SHOULD AFFIRM THE INTERNATIONAL BUREAU'S INTERPRETATION OF THE DBS FOREIGN OWNERSHIP RULES.

Only one commenter, UCC, disagrees with the International Bureau's decision that subscription DBS providers should not be subject to foreign ownership restrictions.[12] Specifically, UCC argues that the Bureau's decision would allow applicants proposing to operate "non-broadcast service" to be licensed without regard to Commission foreign ownership and character policy. PRIMESTAR takes issue with UCC's contention that the inapplicability of Section 310(b)(4) to subscription DBS providers also renders inapplicable other Title III provisions relating to the qualifications of applicants for FCC radio licenses. Title III is not a monolithic statutory provision which applies wholesale to all radio licensees. Rather, it has

---

[12] See In re Application of MCI Telecommunications Corporation, 11 FCC Rcd. 16275 (1996).

separate and unique provisions which apply to different radio services.[13] While some of Title III's provisions are widely applicable,[14] others are very narrowly drawn and have limited application.[15] In particular, nothing about the MCI Order or the Commission's Subscription Video decision affects the applicability of Section 309,[16] which requires that the Commission find that grant of an application for a station license would serve the public interest, convenience and necessity.[17] This standard plainly allows the Commission to consider the character and other qualifications of an applicant. Most importantly for present purposes, it would allow the Commission easily to avoid the parade of horribles imagined by UCC.[18] Its concerns lack merit, and the MCI Order should be affirmed.

## IV. THE COMMISSION SHOULD DECLINE TO MODIFY ITS GEOGRAPHIC SERVICE REQUIREMENTS.

PRIMESTAR objects to the attempts of a few participants in this proceeding to impose detailed regulation on DBS operators

---

13 For example, there are separate and distinct provisions which apply to private mobile services (47 U.S.C. § 332), ship radio stations (47 U.S.C. §§ 351-65), ship radio-telephones (47 U.S.C. § 381-86), and direct broadcast satellites (47 U.S.C. § 335).

14 See, e.g., 47 U.S.C. § 309 (concerning the Commission's action upon applications for radio licenses).

15 See, e.g., 47 U.S.C. § 335 (delineating DBS-specific public interest obligations), 47 U.S.C. § 317 (concerning the announcement requirement with respect to certain matter broadcast by "any radio station").

16 See 47 U.S.C. § 309.

17 Id.

18 See UCC Comments at 1.

regarding how they must serve offshore points, particularly Alaska and Hawaii.[19] The suspicions that underlie these proposals -- i.e., that DBS operators will not be motivated by the marketplace to take their Alaska/Hawaii service obligations seriously -- are totally unfounded and make no economic sense. Accordingly, the Commission should go no further than it already has in regulating Alaska/Hawaii service by DBS operators.

The State of Hawaii frets, for example, that, unless the Commission imposes some vague "equal programming value" obligation on DBS operators, they might fulfill their Alaska/Hawaii service requirements by "transmitting multiple channels of test patterns" or "marginal, niche programming."[20] Similarly, Microcom urges the Commission (i) to require specific DBS antennae sizes for specific geographic areas of Alaska; (ii) to compel DBS operators at the same orbital locations to enter into "cooperative agreements" to coordinate their programming to achieve a certain mix of services for Alaska and Hawaii; and (iii) to obligate DBS operators to provide locally based programming for Alaska viewers. Finally, both Alaska and Hawaii argue that existing holders of western orbital locations should have their authorizations canceled (and presumably auctioned) if they fail to have satellites in operation by the expiration of their current construction periods.

---

19 Comments of the State of Hawaii ("Hawaii Comments"); Comments of the State of Alaska; Comments of Microcom.

20 Hawaii Comments at 9.

The overly regulatory approach advocated by Alaska, Hawaii and Microcom is totally unnecessary and would be counter-productive. First, the notion that DBS operators, having undertaken an obligation to serve Alaska and Hawaii, would do so with test patterns or other non-compelling programming is illogical. Instead, DBS operators will have a strong self-interest to maximize their market opportunities and to provide a service to Alaska and Hawaii that will attract subscribers. Thus, there is no rationale for the Commission to tread into the constitutionally-sensitive programming area and attempt to mandate notions of equality.

Neither should the Commission impose rigorous antenna size or other technology requirements on Alaska and Hawaii DBS service. The reality simply is that service to these non-CONUS locations, especially from more easterly orbital locations, is a technical challenge. Moreover, because of Alaska's proximity to Siberia, DBS operators are required by international regulations to rapidly "roll-off" their coverage of portions of Alaska to avoid sending transmissions into Siberia. Thus, there are certain technical and regulatory restraints that will prevent certain DBS operators from providing the same technical service parameters to Alaska and Hawaii that they provide to CONUS.

But the fact there are technical and regulatory restrictions does not suggest that DBS operators will intentionally deploy technologies that would make service to Alaska and Hawaii impossible because of signal strength or antenna size. Having an obligation to serve Alaska and Hawaii is motivation enough to

encourage DBS operators to make the most of the available subscriber universe in these states.[21] Finally, issues such as retransmission of local Alaska broadcast stations or mandated cooperative programming agreements among DBS operators are beyond the scope of the Commission's jurisdiction and would severely hamper the ability of DBS operators to serve their entire potential audience.[22]

## V. THE COMMISSION SHOULD DECLINE TO ALTER ITS RULES AS REQUESTED BY SKYBRIDGE.

The comments of SkyBridge L.L.C. ("SkyBridge"), recognize the Commission's desire to focus on issues of DBS and non-geostationary orbit ("NGSO") satellite frequency sharing "in future rulemakings".[23] Nevertheless, SkyBridge spends considerable effort advancing the merits of its proposed NGSO system and urging the Commission to take certain actions in these future rulemakings. These arguments are misplaced and should not be considered in this proceeding.

---

[21] In fact, TEMPO's service from 119° W.L. to portions of Alaska, and especially the "railbelt" area identified by Microcom, would be quite robust.

[22] The suggestion that the Commission summarily cancel authorizations for western orbital locations at the end of their construction periods would hardly promote rapid service to Alaska and Hawaii. Instead, it would create additional delay and deprive the entities with the most DBS experience of an opportunity to address the significant economic and technical challenges of service to all states. PRIMESTAR submits that those who have pioneered the DBS service should be afforded a reasonable amount of additional time to deploy satellites in their western locations.

[23] Notice at ¶ 50.

In the remainder of its comments, SkyBridge advocates new technical rules for DBS operators (in addition to those contained in the International Radio Regulations, Appendix 30). The net effect of SkyBridge's proposals, of course, would be to freeze DBS operators in a technical straightjacket and preclude future enhancements that will develop as technology progresses.

For example, SkyBridge exhorts the Commission to adopt "stringent" sidelobe performance parameters for DBS antennae.[24] It also argues for the adoption of "new protection criteria" in the Region 2 DBS plan.[25] These types of proposals would significantly narrow the scope of DBS operators' technical flexibility and would force them to forego technology solutions that might be highly attractive and beneficial to consumers of DBS services. PRIMESTAR urges the Commission to decline SkyBridge's offer to use this proceeding to promote the flexibility of unlaunched NGSO systems at the expense of a young, but rapidly growing DBS service.

---

24 Comments of SkyBridge at 6.

25 Id. at 10.

## VI. CONCLUSION.

For the reasons set forth above, the Commission should decline to adopt a cable/DBS cross-ownership prohibition as inconsistent with the public interest, should affirm the MCI Order, should decline to modify its geographic service requirements, and should not alter its rules as requested by SkyBridge.

Respectfully submitted,

**PRIMESTAR, INC.**

By: _____
Philip L. Verveer
Michael G. Jones
Angie Kronenberg

**WILLKIE FARR & GALLAGHER**
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

By: _____
Benjamin J. Griffin

**REED SMITH SHAW & McCLAY**
1301 K Street, N.W.,
East Tower, Suite 1100
Washington, D.C. 20005

ITS ATTORNEYS

**April 21, 1998**

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 21st day of April, 1998 copies of the foregoing Reply Comments of PRIMESTAR, INC. were delivered by hand, unless otherwise indicated, to the following parties:

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, NW
Room 814
Washington, DC 20554

Commissioner Harold W. Furchtgott-Roth
Federal Communications Commission
1919 M Street, NW
Room 802
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW
Room 832
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, NW
Room 826
Washington, DC 20554

Commissioner Michael K. Powell
Federal Communications Commission
1919 M Street, NW
Room 844
Washington, DC 20554

Regina Keeney, Chief
International Bureau
Federal Communications Commission
2000 M Street, NW, Room 800
Washington, DC 20554

Christopher J. Murphy
International Bureau
2000 M Street, N.W.
Suite 500
Washington, DC 20554

ITS, Inc.
2100 M Street, NW
Room 140
Washington, DC 20037

Dennette Manson